No. 45

In the Supreme Court of the United States

OCTOBER TERM, 1956

RAYONIER INCORPORATED, a corporation, *Petitioner*,
vs.
UNITED STATES OF AMERICA, *Respondent*.

UPON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

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Preliminary

Attention is called to Government counsel's failure to discuss Part 5 of Petitioner's opening brief relating to the construction of the amended complaint. Tacitly at least, they concede our points as well taken.

We do not accept Respondent's statement of "Questions Presented" as accurately or completely descriptive of the issues here to be reviewed. Neither do we accept its Statement of the case as adequate to fairly present the material facts.

Liability of United States as Volunteer

Respondent's brief is notably deficient in its failure to meet head on, the position of the Forest Service as a volunteer. Whatever the reason for its actions, the fact is that as soon as the fire broke out on August 6, the Forest Service assumed supervision and direction of the fire fighting at all stages. The facts are that the

Forest Service induced reliance by Petitioner upon the Forest Service, that the Forest Service was negligent, that by reason of such negligence the fire broke away and that Petitioner was damaged as a result.

The law, as made perfectly clear in *Indian Towing Company v. United States,* 350 U.S. 61, is that the Forest Service having undertaken to act and having induced reliance, had a duty to act without negligence. Under *Indian Towing* it does not matter whether the reason for the Government's assumption of this role is that it was acting as a public fire department or as conservator of Government-owned timber or under contract with the State of Washington, or as an owner of land on which the fire started or from which the fire spread.

The language of this Court in the *Indian Towing Company* decision, 350 U.S. at p. ....., 100 L.ed. (Advance p. 89), can aptly be paraphrased as follows:

> "The Forest Service need not have undertaken that responsibility but the fact remains that it did so and did so voluntarily. Petitioner and others in the area knew of this and relied upon the Forest Service to carry out its assumed responsibility. Once the Forest Service exercised its discretion to supervise and direct the fire fighting and engendered reliance thereon, it was obligated to use due care to make certain that the fire was controlled and extinguished and that if the fire did not become extinguished it was further obligated to use due care to discover that fact and to take all reasonable and prudent action and employ sufficient men and equipment, under the circumstances prevailing, to prevent its spread. If the Forest

Service failed in its duty and damage was thereby caused to Petitioner, the United States is liable under the Tort Claims Act."

It does not matter that the Forest Service participated in combating a great many fires throughout the United States and its Territories, nor that it spent a lot of money in doing so.[1] The Forest Service controls the great majority of the timbered areas. Its costs are minor compared to the value of the Government timber it is supposed to protect. Neither are its costs high in proportion, when compared to similar costs incurred by private industry.

The fact that the Forest Service does cooperate extensively, both with the states and with private industry, is no more significant than the fact that private industry in the aggregate cooperates extensively with the Forest Service.

Government counsel again have ignored and refuse to answer our question as to whether the Petitioner would be liable to the Government were the situations in this case reversed. Suppose it were the Rayonier logging superintendent who had assumed supervision and direction of the fire fighting and the Forest Service had relied upon him to do so. Suppose it were Rayonier's logging superintendent who said in effect:

"In spite of the long dry spell, the low humidity, the dry Northeasterly winds, the smoldering fires

[1]The statistics quoted by Government counsel on p. 46 of their brief that in fiscal year 1953 the Service controlled 11,063 forest fires at a cost of more than $5,000,000 can be misleading unless it is borne in mind that within the category of forest fires are included numerous minor spot fires at camping grounds and elsewhere in forest areas and that the bulk of the expense is incurred in connection with comparatively few major conflagrations.

> and the tremendous stands of timber to the leeward, we will do nothing to try to extinguish this smoldering fire; we will only put 8 or 10 men to stand watch during the daytime over the 1600 acre burning area and we will leave the fire completely unattended after the normal daytime working hours."

Would Rayonier be liable for such grossly negligent indifference? Would it be immune from liability because it lends men and equipment to assist in any and all fire fighting in the area, both on public and private lands, whenever it is called upon to do so?

If Petitioner, a private person, would be liable under these circumstances, it necessarily follows that the United States is liable, for that is the test imposed by the Tort Claims Act.

Under the Tort Claims Act justice is supposed to be applied equally in all directions. But Government counsel would not have it so.

Counsel argue that if the Government is liable in this case it would become an insurer. They point out that whole communities might be destroyed by fire and redress would be sought from the Government. The simple answer is that the Government would not be an insurer, but if its employees are negligent and their negligence is the cause of the damage, the Government should pay. Why not? Certainly, Congress intended that it should when it enacted the Tort Claims Act. Bigness of property holdings, of number of employees, of aggregate spending, or of number of transactions is no proper basis of immunity. The amount of damage caused by negligence is no ground for immunity. If the philoso-

phy of counsel's argument were sound, then General Motors Corporation should be immune from liability because it is big; doubly immune if the injured party is badly hurt. Though the analogies sound preposterous and ridiculous, we see no difference in fundamental principle.

Forest Service Employees Were Not Public Firemen

In their brief, Government counsel would lead this Court backward to the abandoned shelter of the "general welfare" and "public function" theories which are found in the definitions of "governmental function" to justify immunity of municipal corporations. Counsel's speculations are unrealistic, contrary to the allegations of the amended complaint, contrary to fact, and immaterial under the Federal Tort Claims Act.

They would have this Court believe that the Forest Service and the Forest Service alone, is equipped to fight any and all fires in its various districts; that it alone acts in case of fire; that its principal occupation is fire fighting; that without the Forest Service no organized fire fighting could take place and that only Federal money is spent for fire protection and suppression.

The facts are, as the amended complaint alleges (R. 16-18), that the Forest Service has relatively little fire fighting equipment, and devotes a relatively small amount of its time, efforts and money on fire prevention and suppression activities. Petitioner herein, Rayonier Incorporated, and other timber operators also maintain fire fighting equipment and have men available to fight fires in this area, and it is the expected

practice that the one in charge, namely, the District Ranger of the Forest Service, will draw on this reservoir according to the needs of the particular situation.

The fact is, as alleged in the complaint (R. 16-18) that neither the Forest Service nor the Petitioner nor any other timber operator alone has sufficient men and equipment to cope with a major fire; that each has a fire suppression plan to be put into operation in case of need whereby the men and equipment in the area can be called upon to aid in the fire fighting. It is natural and logical that some one of the timber operators in a given area, that is, the Forest Service, the State of Washington, or Rayonier Incorporated and other private timber industries, assume leadership and command upon the outbreak of major fire. There are a number of areas in the Pacific Northwest where private industries or private associations undertake that leadership.

The Petitioner herein would not maintain fire equipment nor train its men in fire fighting duties were it not for the protection of Petitioner's timber. For exactly the same reasons the Forest Service maintains some fire equipment and some men, and were it not for the fact that the Forest Service has extensive holdings in this area, it would have none. The Forest Service does not have authority to engage in fire fighting activities except under circumstances where Federally-owned timber is involved (see Petitioner's Opening Brief, pp. 38-41). It is because of the intermingling of public and private timber holdings and the fact that fire is not an observer of titles or boundary lines that cooperation is necessary.

Liability of United States for Conditions and Practices on Right of Way

On pp. 18-20 of the answering brief, Government counsel, without warrant, go outside the record before this Court. The amended complaint alleges that the United States "owned, had control of and free and unrestricted access to" the right of way and adjoining lands upon which the fire started (R. 11). That allegation must be accepted as fact for all purposes of this hearing. It was not frivolously or carelessly made. We do not, and this Court cannot, accept the statements of Respondent's counsel as complete, correct or presented in such manner as to enable this Court to appraise and determine fairly the rights, duties and obligations of the several parties involved. We cannot properly, and do not intend to here present our evidence supporting that allegation of the complaint. But under the allegation we are entitled and prepared to prove that the United States was the legal and equitable owner of the right of way,[2] had contractual and property rights giving it effective and practical right of access to and control of the right of way, and that the relationships and dealings between the Government and the Port Angeles Western Railroad were such as to justify the Court in finding that the Government is fairly chargeable with responsibility for the conditions and practices on the lands in question.

Respondent's brief is misdirected in its discussion of the Government's duties as owner of the land across

[2]Under Washington law the vendee under a forfeitable executory contract of sale has neither legal nor equitable title or interest in the property. *Ashford v. Reese*, 132 Wash. 649, 233 Pac. 29 (1925), *Turpen v. Johnson*, 26 Wn.2d 716, 175 P.2d 495 (1946).

which was operated the Port Angeles Western Railroad.

It is misdirected because it cites cases dealing solely with the rights and obligations of the dominant estate owner and the servient estate owner as between themselves, but which do not involve their respective obligations to third parties.

It is misdirected because it cites many cases dealing with the liability of railroad companies for fire originating on and spreading from the railroad right of way. In the case at bar Petitioner could sue either the railroad company (the dominant owner) or the United States (the servient owner) or both of them, as Petitioner elects. Here we have chosen to sue only the United States. The fact that we might also sue the railroad is immaterial.

It is misdirected in not distinguishing between an easement, which is a right to use property, and the property itself. For example, on page 27 Respondent's brief says that the owner of the servient estate "has no duties with respect to the easement except the negative one of not interfering with the latter's use." It is correct that the *right or permission to use* must not be unreasonably interfered with. But the owner of the servient estate is neither precluded nor excused from his rights and duties with respect to the land to the extent that his control of or access to the land is not surrendered by the easement. For example, I might give my neighbor an easement across my house walk for my neighbor's use in gaining access to his house. I am not thereby relieved from my duty to third persons to maintain my walk in

safe condition. Neither could my neighbor prevent me from doing anything on, over or under my walk so long as it did not interfere with his right to use the same as granted by the easement.

Respondent's brief is misdirected in the manner in which it refers to obligations of the landlord in landlord-tenant cases. The duty of the landlord is dependent upon the extent to which he has surrendered the right of access to and control of the leased premises and the extent to which the tenant has the exclusive right of possession and control. If, by terms of the tenancy, the landlord has no right of access or control, then the landlord is relieved of many of the responsibilities attaching to an owner of property. On the other hand, depending upon the extent of retained right of access and control, or the duties to repair which he has expressly assumed while retaining no right of access for other purposes, the landlord may be held responsible for the condition of the premises. The whole question hinges upon the extent by which the owner of property has placed it beyond his own power to deal with it. So it is with the owner of land upon which someone else has been granted a right to do something, whether it be a right of passage which is granted under the Right of Way Act of March 3, 1875, or whether it be a right of use under some other contractual arrangement. In the case at bar the United States "owned, had control of and free and unrestricted access to" the lands where the fire started (R. 11).

On page 22 of its brief, the Government states:

> "It is settled that, in the absence of a contract specifying the duties and obligations of the domi-

> nant and servient owner with respect to the easement, the holder of the servient estate is under no obligation, either to the dominant owner or a third party, to make repairs. Instead, 'the duty is upon the one who enjoys the easement to keep it in proper condition, and, if he fails to do so and injury to third persons results, he alone is liable.' "

That is not a supportable statement of the law insofar as the rights of third persons are concerned. *Reed v. Allegheny County,* 330 Pa. 300, 199 Atl. 187, cited by counsel, is a case in which judgment had been entered against both the dominant and servient owners for injuries resulting from negligent condition of the roadway. In the same action judgment was rendered in favor of the servient owner against the dominant owner on the ground that *as between the two owners* the owner of the dominant estate had the obligation to make repairs. The case was reversed only with respect to the judgment in favor of one defendant against the other defendant with instructions to the lower Court to determine the relationships between those parties as placing the burden of repair upon one or the other, *as between themselves.* The case clearly supports our contention that both the dominant and servient owners may be liable to third parties.

None of the remaining cases cited on page 22 of Respondent's brief is applicable to the case at bar because, with one exception, they relate solely to rights and obligations of the dominant owner and the servient owner *inter sese,* and do not involve rights of third parties. The one exception is *Wells v. North East Coal Co.,* 274 Ky. 268, 118 S.W.2d 555, which holds simply that the

dominant owner is liable to a third party but does not involve the question of liability of the servient owner to a third party.

The law is well established that the owner of the servient estate has the right to use the land over which an easement is granted to the extent such use does not interfere with the enjoyment of the easement.[3] Elimination of the combustible material from the right of way would not interfere with the enjoyment of the Railroad's easement. Abatement of unlawful and fire hazardous practices on the right of way would not interfere with the enjoyment of the easement. If the Forest Service had taken steps to see that the conditions and practices on the right of way conformed to the standards of care which the law and statutes of the State of Washington require of a landowner in a forest area, the Railroad Company could not have objected or claimed interference with its easement. It is immaterial so far as Petitioner is concerned or so far as any other third person is concerned, whether the Government has recourse over against the Railroad Company.

The fallacy of Government counsel's contention becomes graphically apparent when one considers that under their theory the owner of timberland could log the timber, leave the slash and debris where it falls, and then escape all responsibility for the condition of the land or the practices thereon simply by granting an easement across that land. That is patently unsound. The owner of land cannot escape his obligations and duty to maintain it in a safe and lawful condition un-

[3] 17 Am. Jur. 993 at 994, 995, Easements §96; 28 C.J.S. 750, 751, Easements §§72 and 73.

less he parts with all right of control or access to the land. Generally, by conveying fee title, a grantor no longer has right of access to or control of the land and therefore is not liable for anything which happens after title passes from him. To some degree the same principle applies where property is leased to another. However, even under landlord-tenant rules, if the landlord retains the right of access to the leased premises, he then remains liable for damages to third persons resulting from a dangerous condition of the premises.

Appel v. Muller, 262 N.Y. 278, 186 N.E. 785;

Paine v. Gamble Stores, Inc., 202 Minn. 462, 279 N.W. 257, 116 A.L.R. 407;

Johnson v. Prange-Geussenhainer Co., 240 Wis. 363, 2 N.W.2d 723;

City of Dalton v. Anderson, 72 Ga.App. 109, 33 S.E.2d 115;

Marzotto v. Gay Garment Co., 11 N.J. Super. 368, 78 A.2d 394;

See also the annotation in 89 A.L.R. 480.

Since the owner of land over which an easement is granted has access thereto and can do anything on the right of way which does not interfere or conflict with the use of the easement, it follows with even greater force than in the landlord-tenant situation that such landowner is liable for damage to third persons resulting from an unlawful and hazardous condition of the land. It does not matter whether the land was in that condition when the Government acquired title thereto or whether the condition was created by the holder of the easement. The Government, as owner, accepted re-

sponsibility for the condition of the land when it first acquired title thereto, and it had years in which to abate the hazardous conditions and practices. Regardless of its rights against the Railroad, the Government as the owner of the fee is still responsible to third parties for the results of its condition.

Even if we accept, for purposes of argument, counsel's statement that the railroad held an easement pursuant to the Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. 934, our contentions as to the Government's responsibility and its right of control and access are no less sound. The Respondent relies heavily on *Great Northern Railway Co. v. United States,* 315 U.S. 262, and *Himonas v. Denver & R.G.W.R. Co.,* 179 F.2d 171. Those cases actually support our contentions because they make clear the fact that under the Act of March 3, 1875, the railroad is granted a use right only to the extent necessary to conduct its railroad operations and not to the exclusion of other compatible uses of the right of way. In the *Great Northern* case this Court held that the mineral and oil rights in the right of way area remained in the United States and, by implication at least, that those rights could be enjoyed simultaneously with the use of the right of way for railroad purposes. The *Himonas* case holds that an irrigation ditch or flume could be maintained by others across the right of way and under the railroad tracks and that the railroad could not properly deny such use to adjoining landowners. The 10th Circuit Court of Appeals made a significant observation at page 173 in which it states that the utilization of water for irrigation promotes the prosperity and well being of the public as a

whole and that states have given effect to this public benefit by enacting legislation authorizing condemnation and the means of enjoying water.

This is consistent with the philosophy of our argument that the lands, including the right of way, which were owned by the Government, must be maintained to standards set by the State Legislature for the public good and for the protection and preservation of other property which might be endangered by the fire hazardous conditions and practices complained of.

Each of Several Acts of Negligence Was a Proximate Cause

Respondent's analysis (pp. 36-39) of the proximate cause question confirms our argument. Counsel assume, as they must, though *arguendo,* that the fire started because of negligence. But they term it "abstract negligence," stating that it did not result in the damage. They do not explain how Petitioner's timber got burned if it wasn't from the fire which was negligently started on August 6. Counsel then point to the wind on September 20 as being the cause of the fire and tell us that we don't really complain about how the fire got started in the first place.

To make the point perfectly clear, let us draw a series of pictures, the first of which shows the Forest Service laying a stack of inflammables on Government land while a bunch of boys are playing around it with torches, the next showing the pile catching fire as might be expected, the next showing the Forest Service adding fuel to the fire along a path known to be down wind and leading to Petitioner's timber. Each of the scenes

portrayed is a separate act of negligence and each directly and proximately contributes to and causes the damage. Since each act was committed by the same person it hardly seems fair that each subsequent act should excuse the offender from responsibility for his preceding offense, even if, after the fire starts the offender takes off his woodsman's cap and puts on a fireman's helmet.

Under the conditions described in the complaint we see no valid distinction between actively feeding the fire and standing idly by knowing that there is already plenty of fuel to keep it burning and the proper wind and weather to carry it along the course leading inevitably to stands of virgin timber.

The foregoing is so fundamental that citation of authority would be superflous.

"Liability Without Fault" and "Negligence *Per Se*" Distinguished

Counsel attempt to characterize Petitioner's case as one based upon absolute liability without fault, and cite *Dalehite v. United States,* 346 U.S. 15, and subsequent cases in which the Court has ruled that the Tort Claims Act does not subject the Government to liability without fault. Counsel again misdirect their argument.

The *Dalehite* case and others cited at the bottom of page 30 of Respondent's brief,[4] involved damages which were caused by inherently dangerous articles. In each of those cases the Court found that there was no negligence on the part of Government employees. But had

[4] *United States v. Inmon,* 205 F.2d 681, (CA 5); *Harris v. United States,* 205 F.2d 765 (CA 10).

there been negligence, we believe the results would have been different. In the *Dalehite* case if the explosive fertilizer had been negligently exposed to flame and an explosion followed, the Government would have been liable. In the *Inmon* case if the Government had failed to make an effort to clean up the old firing range and dispose of dud shells, or had failed to fence and post signs around the area, thus being negligent, the Government would have been liable. In the *Harris* case if the Government employees had negligently flown over the adjacent farm lands and sprayed the herbicide directly on those crops the Government would have been liable. However, in each of those cases the Court expressly found no negligence existed.

We do not contend that the combustible matter on the Government lands was an inherently dangerous commodity or that the Government is liable without fault. Our case is one of claimed liability *with* fault, based upon negligence.

The Washington statutes, Sections 5807 and 5818, establish standards of care for landowners practically identical to the standards of care required by common law.[5] Failure to conform to those standards constitutes negligence.

Government counsel confuse "negligence *per se*" with "absolute liability without fault."

In the case at bar the slash and debris on the Government property was not in itself inherently dangerous. It took something more to make that debris to spring into flame and cause the damage complained of. The

[5]See cases cited in Petitioner's Opening Brief, pp. 47-62.

inflammable material, both on the right of way and the adjoining lands, could have been disposed of by the Forest Service employees and the probability of resultant damage would have been avoided. The Forest Service employees knew that the inflammable material would burst into flame if sparks were introduced into it; knew that the railroad equipment was defective and was being operated in a negligent manner apt to throw sparks into the debris; knew that fire on those lands would imperil and might spread to the forests in the vicinity, and had the power to prevent both the fire hazardous condition and the fire hazardous practices. Yet they failed to do so. That was negligence. The common law, as well as the public policy of the State of Washington as expressed by the Legislature in Sections 5807 and 5818, are to the effect that in forested areas where fire can do extensive damage, it is negligence to permit the accumulation of inflammable material. It is such negligence of which we complain.

Other cases cited on page 30 of the Government brief[6] involve simply the question of whether servicemen who injured persons were acting in the course and scope of their employment at the time the injury was committed. In the case at bar there is no question as to the Forest Service employees' acts and omissions having been within the course and scope of their employment.

Government Duty Under Contract—Good Samaritan Rule

On pp. 57-61 of their brief, Respondent's counsel dis-

[6] *Williams v. United States*, 350 U.S. 857; *United States v. Campbell*, 172 F.2d 500 (CA 5) Certiorari denied, 337 U.S. 957; *United States v. Eleazer*, 177 F.2d) 914 (CA 4), Certiorari denied, 339 U.S. 903.

cuss at length two cases, *German Alliance Insurance Co. v. Home Water Supply Co.*, 226 U.S. 220, 57 L.Ed. 195, and *Moch v. Rennsselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896. Those two cases actually support Petitioner's contentions.

Let us first repeat that Petitioner does not sue upon the contract between the State of Washington and the Forest Service under which the Forest Service undertook to fight and extinguish fires. Our action is in tort for the Government's negligence in the performance of that contract (see Petitioner's opening brief, pp. 64-67).

The *German Alliance Insurance Co.* case was a contract action, the plaintiff there claiming to be a third party beneficiary of a contract by which a private Water Company undertook to supply water to the City of Spartanburg, South Carolina, and to lay and install certain additional pipes and hydrants which the Water Company failed to do. The Court held that no action would lie *ex contractu* because it was obviously the intention of the contracting parties that the Water Company not be obligated to any one other than the City. The Court pointed out certain deficiencies in the complaint in the following language, 226 U.S. 228:

> " * * * But if, where it did not otherwise exist, a public duty could arise out of a private bargain, liability would be based on the failure to do or to furnish what was reasonably necessary to discharge the duty imposed. The complaint proceeds on no such theory. It makes no allegation that the defendant failed to furnish a plant of reasonable capacity, or neglected to extend the pipes where

> they were reasonably required. Nor is it charged that what the company actually did was harmful in itself or likely to cause injury to others, * * * "

The amended complaint in the case at bar expressly alleges that the Forest Service failed to do what was reasonably necessary to discharge the duty assumed by the Forest Service under the contract and that what the Forest Service actually did was likely to cause injury to Petitioner and others.

Counsel cite *Moch v. Rennsselaer Water Co., supra,* as one in which the Good Samaritan rule is held not applicable in fire cases. We disagree. In that case Judge Cardozo analyzes the Good Samaritan principle and held it not applicable under the facts in that case because the defendant, who had contracted to supply water to the City of Rennselaer, had not undertaken to act to the point where defendant could be held answerable to those injured by defendant's inaction. In discussing the principle, Judge Cardozo makes the following significant statements, 159 N.E. 898-899:

> " * * * The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all. * * * If conduct has gone forward to such a stage that in action would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward. * * * The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good. * * * "

Judge Cardozo then expressly eliminates from consideration in the *Moch* case, an element which is one of the controlling factors in the case at bar, as follows:

> *"We put aside also the problem that would arise if there had been reckless and wanton indifference to consequences measured and foreseen."* (Italics supplied)

The Forest Service affirmatively took charge of the fire fighting operations and induced reliance upon its role as commander and was thus in a position where it could cause harm by not conducting itself prudently. By failing to use sufficient available men and equipment and by doing practically nothing for forty days while the smoldering area continued to imperil nearby timber, the Forest Service employees manifested reckless and wanton indifference to consequences measured and foreseen.

New York Court of Claims Act

Respondent's counsel devote pages to two New York decisions[7] involving that State's Court of Claims Act. They are not applicable.

Both the *Hughes* and the *Steitz* cases involved asserted negligence of municipalities which maintained fire departments for the benefit of the public at large, and not for the special benefit or protection of the city's property. In the case at bar the Forest Service did not maintain a fire department at all, and its activities were undertaken, associated with and for the direct and special benefit of Government-owned timber held and

[7] *Hughes v. State*, 252 App. Div. 263, 299 N.Y.S. 387, and *Steitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704.

operated for pecuniary gain and profit (See Petitioner's Opening Brief, pp. 35-41).

Moreover, the New York decisions place repeated emphasis upon the *public* and *governmental* character of city fire departments, an element which this Court, in *Indian Towing Company v. United States*, explicitly rejected as not pertinent in testing for liability under the Federal Tort Claims Act.[8]

Both the *Hughes* and the *Steitz* decisions stress the absence of any duty owed by the municipalities to the plaintiffs as reasons for non-liability and point out that while cities are required to maintain fire departments, there is no requirement as to the degree or character of service rendered nor as to the extent of the fire fighting facilities. In the instant case the Forest Service owed a duty as a volunteer, under common law and statute as a landowner, and under contract (See Opening Brief, pp. 44-72). The *Hughes* case is further inapplicable because plaintiff there sought to hold the State liable for the negligence of one of its municipalities. The New York Court expressly pointed out, 299 N.Y.S. 391, that the State is not responsible for the negligence or malfeasance of its officers or agents except when such liability is voluntarily assumed by the Legislature. The *Hughes* case failed completely in establishing a duty on the State, even though it was arguable that the negligent municipality had a duty. Government counsel significantly omit from their quotations the following pertinent language which appears, 299 N.Y.S.391:

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[8]It is noteworthy that two of the six Judges participating in the *Steitz* decision, in their dissent, subscribed to the reasoning adopted by this Court in *Indian Towing* in believing that the "governmental" nature of fire department activities is immaterial.

> "Counsel for claimant urges that the duty of furnishing adequate fire protection to its citizens is a State function. No authority is cited to support such a startling proposition nor has our own investigation disclosed any."

It was with reference to this contention that the New York Court observed, as quoted on page 68 of Respondent's brief, that no moral or legal obligation rested on the State to furnish such protection.

Analysis discloses an apparent conflict in the New York cases involving negligence in the performance of governmental functions. The *Hughes* and *Steitz* cases are bottomed in large measure upon immunity from negligence in the performance of governmental functions. Other cases have imposed liability under such circumstances. See, *e.g., Holmes v. County of Erie,* 266 App.Div. 220, affirmed 291 New York 798, 53 N.E.2d 369, where the County was held liable to an inmate of the penitentiary for negligence of County employees, and *Williams v. City of New York,* 57 N.Y.S.2d 39, where the City was held liable for injuries resulting from negligent maintenance of a fire house. It is sufficient to say that this Court has repeatedly held that the public or governmental character of the negligent act is immaterial (See opening brief, pp. 41-43).

Conclusion

For the reasons stated in Petitioner's Opening Brief and in this Reply Brief, we respectfully ask the Court to reverse the order and judgment of the Courts below.

Respectfully submitted,

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